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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 438

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FULTON IRON COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

---

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JAMES EASLY,
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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 438

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FULTON IRON COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR,
*Respondent*

---

## PETITION FOR WRIT OF CERTIORARI

---

*To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:*

The Petitioner, Fulton Iron Company, a corporation, Plaintiff, and appellant below, prays that a writ of certiorari be issued by this Court to review the judgment of the United States Court of Appeals, District of Columbia Circuit, entered October 13, 1948 (R. 71) affirming a judgment of the United States District Court for the District of Columbia.

### Opinion of the Court Below

The opinion of the Court of Appeals is not yet reported but is set out in full in the appendix hereto (R. 71).

## Jurisdiction

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347a, and Section 28 of the District of Columbia Uniform Sales Act of 1937, 50 Stat. 35, Chapter 43, Section 21; Title 28, Section 1205, District of Columbia Code, 1940 Edition.

## Statutes Involved

Excerpts from the Surplus Property Act of 1944; Public Law 457, 58 Stat. 763, 78th Congress; Ch. 479-2d Session:

> *Sec. 2.* The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—
>
> (a) to assure the most effective use of such property for war purposes and the common defense;
>
> (b) to give maximum aid in the reestablishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment;
>
> (c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;
>
> (d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;
>
> • • • • • • •
>
> (t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

*Sec. 20.* Applicability of Antitrust Laws.

Whenever any disposal agency shall begin negotiations for the disposition to private interests of a plant or plants or other property, which cost the Government $1,000,000 or more, or of patents, processes, techniques or inventions, irrespective of cost, the disposal agency shall promptly notify the Attorney General of the proposed disposition and the probable terms or conditions thereof. Within a reasonable time, in no event to exceed ninety days after receiving such notification, the Attorney General shall advise the Board and the disposal agency whether, in his opinion, the proposed disposition will violate the antitrust laws. Upon the request of the Attorney General, the Board or other Government agency shall furnish, or cause to be furnished such information as it may possess which the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section or to determine whether any other disposition of surplus property violates the antitrust laws. Nothing in this Act shall impair, amend, or modify the antitrust laws or limit and prevent their application to persons who buy or otherwise acquire property under the provisions of this Act. As used in this section, the term "antitrust laws" includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act; and the Act of August 27, 1894 (ch. 349, secs. 73, 74, 28 Stat. 570), as amended.

Excerpt from the District of Columbia Uniform Sales Act of 1937, 50 Stat. 35, ch. 43, sec. 21:

Sec. 28-1205 (11:81). • • •

In the case of a sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer.

or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

Excerpt from the United States Code, Section 308; Revised Statutes Section 308:

> Reference of questions to subordinates. Any question of law submitted to the Attorney General for his opinion, except questions involving a construction of the Constitution of the United States, may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom the same may be referred. If the opinion given by such officer is approved by the Attorney General, such approval indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney General.

**Summary Statement of the Matter Involved**

On September 13, 1947, the Administrator of War Assets, the predecessor in office of respondent, by letter (Exhibit F, R. 27), offered to sell certain surplus property designated by War Assets Administration as "Plancor 438."

Plancor 438 is a blast furnace plant located in Granite City, Illinois. On January 26, 1942, Koppers Company, Inc., sold this plant to the Government and has been operating the same ever since as a lessee of the Government. Twice before attempts to sell said Plancor had been made. On the first attempt no bids were received and on the second attempt two bids were received of which the Petitioner's was the higher but the bids were rejected by the War Assets Administration as being inadequate. The lower bid was filed by Hanna Coal and Ore Company in the name of a local company.

On September 6, 1947, said Administrator determined and set the fair value of said Plancor at $2,500,000 (Exhibit

G, R. 32) pursuant to War Assets Administration Regulation 5, Part 8305.13(a) which reads as follows:

> Except as provided otherwise in this section, the disposal agency shall in all cases establish the fair value of the property assigned to it for disposition.

The fair value so set by said Administrator continued in effect and was the fair value of said Plancor on October 6, 1947, the day upon which said Administrator had announced (Exhibit F, R. 23) that he would receive bids for the sale of said Plancor.

Prior to October 6, 1947, said Administrator informed petitioner that the fair value of said Plancor had been set at $2,500,000. Petitioner thereupon prepared and filed a bid in excess of said fair value.

On October 6, 1947, the following bids were filed with said Administrator:

| | |
|---|---|
| Missouri-Illinois Furnaces, Inc. | $3,255,000 |
| Tucker Corporation | 2,751,000 |
| Fulton Iron Company | 2,750,000 |

Missouri-Illinois Furnaces, Inc., is a corporation which was organized on October 3, 1947, by Koppers Company, Inc., and Hanna Coal and Ore Company for the purpose of bidding on said Plancor. The two companies owned equally the shares of the stock of Missouri-Illinois Furnaces, Inc., of which the directors, with one exception, were either officers and/or directors of Koppers Company, Inc., or Hanna Coal and Ore Company.

On October 10, 1947, four days after the bids had been opened, said Administrator increased the minimum fair value of said Plancor to $3,250,000 (Exhibit H, R. 34) without cause shown and without any notice to petitioner.

As a result of the action of said Administrator in arbitrarily increasing said fair value, petitioner's bid, which

was $250,000 greater than the fair value in effect on October 6, 1947, became $500,000 less than the fair value as increased by said Administrator on October 10, 1947. The bid of Missouri-Illinois Furnaces, Inc., then became the only bid in excess of the new fair value, and by a remarkable coincidence, only $5,000 greater than the new fair value.

The consequence of this action of said Administrator was to disqualify the bid of petitioner by reason of War Assets Regulation 5, Part 8305.19(a) which provides as follows:

> • • • disposal agencies may reject any offer which is below the fair value of the property • • •

The bid of petitioner fully complied with all the terms and conditions of said Administrator's offer to sell (Exhibit F, R. 27) and said War Assets Regulation 5 and was, on the date when filed with and opened by said Administrator, in an amount greater than the fair value as then set by said Administrator. The said Administrator's Letter and Formula for Acceptable Proposals (Exhibit F, R. 27) by its very terms was an offer to sell said Plancor:

> War Assets Administrator will make sale of this property to the bidder whose purchase proposal (a) meets and/or betters the terms and conditions of this Formula for Acceptable Proposals on a competitive basis and (b) best meets the Objectives of the Surplus Property Act. (Exhibit F, second paragraph, R. 27)

Petitioner, by filing its bid with said Administrator, accepted said offer and thereby entered into a binding contract with said Administrator for the purchase of said Plancor provided that no one else filed a more acceptable bid which did not fail.

Although the bid of Missouri-Illinois Furnaces, Inc., was for a larger amount than the bid of petitioner and was a more acceptable bid in that respect only, nevertheless, the

bid of Missouri-Illinois Furnaces, Inc., failed so that the bid of petitioner was the most acceptable bid.

The Administrator, having in mind that bids for the purchase of surplus property might fail, established the procedure for such cases in Regulation 5, Part 8305.19(d) as follows:

> Notice to Unsuccessful Bidders: Non-performance by Successful Bidder.
>
> When an offer for surplus real property has been accepted, the disposal agency shall notify the unsuccessful bidders of such acceptance and return their deposits, if any, to them. If the successful bidder fails to complete the transaction, the disposal agency shall promptly notify by mail all those who made unsuccessful offers during the priority period or any time allowed thereafter that if they renew their offers within fifteen (15) days from the date of mailing of the notice they will be reconsidered on the same basis on which they would have been considered had the offer accepted not been received in the first instance.

Upon the failure of the bid of Missouri-Illinois Furnaces, Inc., on the several grounds hereinafter set forth, petitioner became entitled to the benefit of said Regulation 5, Part 8305.19(d) and respondent was under a duty to perform his contract with petitioner by observing and carrying out the provisions of said Regulation.

On December 31, 1947, said bid of Missouri-Illinois Furnaces, Inc., failed in that it expired by reason of a condition in said bid that if transfer of title to Missouri-Illinois Furnaces, Inc., were not completed prior to December 31, 1947, then said bid shall become null and void (Exhibit A, Item 11, R. 16). Transfer of title to Missouri-Illinois Furnaces, Inc., was not made or completed prior to December 31, 1947, and had not been made on February 2, 1948, when

this action was filed in the District Court of the United States for the District of Columbia.

On January 12, 1948 (Exhibit B, R. 20) and within fifteen days following the expiration of said bid of Missouri-Illinois Furnaces, Inc., petitioner requested respondent to make said Plancor available to petitioner and offered to pay an additional amount of $505,000 so that the Government would receive as much from petitioner as it would have received from Missouri-Illinois Furnaces, Inc.

The bid of petitioner was the only bid which complied with the terms and conditions of said invitation for bids and said Regulation 5. The Tucker Corporation did not renew its bid.

However, respondent refused to consider the bid of petitioner.

The Surplus Property Act of 1944, Section 20, provides that whenever any disposal agency begins negotiations for the disposition to private interests of property which cost the government $1,000,000 or more, the disposal agency shall notify the Attorney General of the proposed disposition. Not more than ninety days after such notification, the Attorney General shall advise the disposal agency whether, in his opinion, the proposed disposition will violate the antitrust laws.

On October 17, 1947, said Administrator referred the bid of Missouri-Illinois Furnaces, Inc., to the Attorney General for his opinion whether the proposed disposal of said Plancor to Missouri-Illinois Furnaces, Inc., would violate the antitrust laws.

The Department of Justice determined that the disposal of said Plancor to Missouri-Illinois Furnaces, Inc., would violate the antitrust laws:

> This Department reached the conclusion that the combination of the two companies growing out of the

joint stock ownership of the proposed purchaser would, particularly because of the affiliations of Hanna Coal and Ore Company, result in violation of the antitrust laws (Exhibit I, third paragraph, R. 36).

Thereupon, Missouri-Illinois Furnaces, Inc., represented in a letter (Exhibit C, R. 23) dated January 14, 1948, to respondent that Hanna Coal and Ore Company on January 31, 1948, would sell its stock in Missouri-Illinois Furnaces, Inc., to Koppers Company, Inc., and that Missouri-Illinois Furnaces, Inc., would be dissolved and its property transferred to Koppers Company, Inc. This letter stated in part:

> • • • A copy of this letter is being sent to the Attorney General of the United States since the changes herein outlined are made to conform to his views (Exhibit C, last paragraph, R. 24).

On the same day, January 14, 1948, respondent replied by letter (Exhibit D, R. 21) to Missouri-Illinois Furnaces, Inc., stating that he had no objection to Hanna Coal and Ore Company selling its stock in Missouri-Illinois Furnaces, Inc., to Koppers Company, Inc., and that he had no objection to the dissolution of Missouri-Illinois Furnaces, Inc., and the transfer of its property to Koppers Company, Inc.

The next day, January 15, 1948, which was the last day of the ninety day period for the Attorney General to advise respondent of his opinion, an Acting Assistant Attorney General sent a letter (Exhibit E, R. 26) to respondent stating that a sale of said Plancor to Missouri-Illinois Furnaces, Inc., as a wholly owned subsidiary of Koppers Company, Inc., would not be in violation of the antitrust laws.

However, the Attorney General did not render an opinion pursuant to the requirements of the provisions of Section

20 of the Surplus Property Act of 1944, nor did he endorse his approval on the opinion of the Acting Assistant Attorney General as required by Title 5, U. S. C. A., Section 308, which provides that the Attorney General may refer to a subordinate a question of law submitted to the Attorney General and that if the Attorney General endorses his approval on the written opinion of the subordinate, it shall have the same force and effect of the Attorney General.

Consequently, respondent failed to obtain the opinion of the Attorney General specifically required by the Surplus Property Act as a prerequisite to the acceptance of the bid of Missouri-Illinois Furnaces, Inc., or the transfer of title.

Thereafter, respondent informed petitioner that he was proceeding to transfer title to Missouri-Illinois Furnaces, Inc., as a wholly owned subsidiary of Koppers Company, Inc., which was a new entity, a stranger to the proceedings and which had not filed a bid on October 6, 1947, the bid of Missouri-Illinois Furnaces, Inc., jointly owned by Hanna Coal and Ore Company and Koppers Company, Inc., having expired on December 31, 1947, and having been found by the Attorney General to be in violation of the anti-trust laws.

Accordingly, on February 2, 1948, petitioner sought an injunction in the District Court against respondent in his personal capacity to restrain him from doing unlawful acts and acts not authorized by the Surplus Property Act of 1944 and War Assets Regulation 5 promulgated to carry out that Act. The District Court denied successively petitioner's motion for a temporary restraining order, a temporary injunction and a motion for an injunction pending appeal but granted respondent's motion to dismiss. The Court of Appeals granted petitioner's mo-

tion for an injunction pending appeal and then affirmed the decision of the District Court.

Thereafter, petitioner filed its motion in the Circuit Court to stay the mandate and to continue the temporary injunction pending application for a writ of certiorari, which respondent opposed with the request that bond be required of petitioner. The Court overruled respondent's objection and stayed its mandate and continued the temporary injunction theretofore entered in full force and effect without bond (R. 83).

Respondent then filed a motion (R. 84) for a withdrawal or modification of certain portions of the Court's opinion of October 13, 1948 (R. 71) which petition the Court denied on November 10, 1948 (R. 94).

## The Questions Presented

The questions involved are:

1. Does petitioner have the capacity to sue the Administrator of War Assets?

2. Did petitioner enter into a contract with the Administrator?

3. Is the United States an indispensable party to this suit?

## Reasons Relied Upon for the Allowance of the Writ

1. Section 21 of the District of Columbia Uniform Sales Act of 1947 (50 Stat. 35, Ch. 43, Sec. 21) involving the distinction between an auction and an auction without reserve has not been determined by the Court.

2. The question whether or not the Administrator may act contrary to an Act of Congress and his own Regulations promulgated thereunder in disposing of surplus property is a matter of national concern.

3. The question whether or not the Administrator can breach his contract to sell surplus property to petitioner by selling the same property to another is a matter of great public interest and importance.

4. The determination of the questions raised in this case will clarify the proper disposal of the tremendous amount of Government surplus property and is of great interest and importance to both the Government and the public.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals, District of Columbia Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all proceedings in the case entitled *Fulton Iron Company* vs. *Jess Larson*, docketed in that Court as No. 9799, and your petitioner prays that the judgment of said Court of Appeals be reversed and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

FULTON IRON COMPANY,
By JAMES R. KIRKLAND,
JAMES EASLY,
WALTER H. MALONEY,
Per J. R. K.,
EDWARD J. HAYES,
Per I. G.,
IRVIN GOLDSTEIN,
*Attorneys for Petitioner.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 438

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FULTON IRON COMPANY, A CORPORATION,
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JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR,
*Respondent*

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## BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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### 1. The Opinion Below

The opinion of the United States Court of Appeals, District of Columbia Circuit, is at page 71 of the record. The District Court rendered no opinion but entered an order which is printed in the record at page 54.

### 2. Jurisdiction

The petition sets forth, on page 2, the grounds on which jurisdiction is invoked.

### 3. Statement of the Case

The petition sets forth an outline of the facts on page 4, under the caption, "Summary Statement of the Mat-

ter Involved." The allegations of the second amended complaint (R. 1) are to be taken as true because respondent's Motion to Dismiss was granted and hence only questions of law are involved herein.

### 4. Statutes Involved

The applicable sections of the statutes involved are quoted on page 2 of the petition.

### 5. Specification of Errors

The Circuit Court of Appeals erred in holding that:

1. Petitioner had no capacity to sue.

2. Petitioner had no contract with the respondent.

3. The United States is an indispensable party to the suit, whereas this action is against the Administrator.

## ARGUMENT

### Petitioner's Capacity to Sue

#### A. *Petitioner Had Entered Into a Contract With Respondent*

The petitioner's capacity to sue depends upon the question whether petitioner had entered into a contract with respondent.

It is clearly established that in offering property for sale, the seller may establish the terms and conditions of the sale, which terms and conditions are binding upon both the buyer and the seller.

In this case, the terms and conditions of the sale are found in the Letter and Formula for Acceptable Proposals (Ex. F, R. 23), War Assets Administration Regulation 5 and the Surplus Property Act of 1944.

Said Regulation 5, promulgated under the provisions of the Surplus Property Act, sets forth the procedure for the disposal of surplus property by the Administrator of War Assets.

The Administrator followed this procedure in seeking to sell said Plancor. He first established the fair value:

Regulation 5, Part 8305.13(a):

> Except as provided otherwise in this section, the disposal agency shall in all cases establish the fair value of the property assigned to it for disposition.

The Administrator then offered to sell the property (Exhibit F, R. 23) to the bidder "whose purchase proposal (a) meets and/or betters the terms and conditions of this Formula for Acceptable Proposals on a competitive basis and (b) best meets the Objectives of the Surplus Property Act" (Exhibit F, second paragraph, R. 23).

Regulation 5, Part 8305.3(b):

> It is the policy of the Administrator that real property shall be disposed of by such methods as best meet the objectives of the Act, including in appropriate cases, the use of sealed bids.

Any bid which is below the established fair value may be rejected—

Regulation 5, Part 8305.19(a):

> Disposal agencies may reject any offer which is below the fair value of the property • • •.

The bids in excess of the established fair value then must be considered and evaluated by the Administrator—

Regulation 5, Part 8305.19(a):

> In evaluating offers, the disposal agency shall be guided by all of the applicable objectives of the Act.

The amount of the bid is not controlling as long as the amount is in excess of the fair value. In fact, the only reference to amount is found in the last paragraph of Section 2 of the Surplus Property Act, as follows:

> (t) except as otherwise provided, to obtain for the government, as nearly as possible, the fair value of surplus property upon its disposition.

It is apparent from the above that the amount of the bid is subordinate to the other objectives of the Act, provided that the bid is in excess of the fair value.

The disposal procedure employed in this case was not the usual auction where the property, upon the fall of the hammer, is knocked down to the highest bidder and, until the seller accepts an offer, he may reject any offer.

The procedure in this case was an auction "without reserve" in which the seller makes an offer to sell. Consequently the making of a bid is an acceptance of the offer of the seller who cannot thereafter reject the bid.

This is the law in the District of Columbia where the sale was consummated and is covered by Section 21 of the District of Columbia Uniform Sales Act, as follows:

"Sale by Auction;

* * * * * * *

> (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve."

This rule is very clearly set forth in the Restatement of the Law of Contracts, Vol. 1, Sec. 27, as follows:

> Auctions; Sales without Reserve.
>
> At an auction, the auctioneer merely invites offers from successive bidders which he may accept or re-

ject unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder. In that case, after a bid has been made, the auctioneer cannot withdraw. Even though the sale is announced to be without reserve, any bidder may withdraw his bid until the auctioneer by fall of the hammer or in other customary manner, announces that the sale is complete. * * *

b. It is a corollary of the principle stated in the present section taken in connection with Section 41 that, where the auctioneer merely invites offers, a bidder may withdraw his bid at any time before the fall of the hammer. A bid in such a case is a revocable offer. If, however, the auctioneer has announced that the sale is without reserve, the auctioneer cannot withdraw after a bid has been made, but a bidder can withdraw his bid until the hammer falls. This is so provided in the Uniform Sales Act, Section 21.

The illustrations of an auction without reserve are found on page 35 of Volume 1 of the Restatement of the Law of Contracts.

3. A advertises, "I offer my farm Blackacre for sale to the highest bidder and undertake to make conveyance to such person as submits the highest bid within the next 30 days." This is an offer, and each bid operates as an acceptance creating rights and duties conditioned on no higher bid being received within 30 days.

The statement contained in the letter of the Administrator dated September 13, 1947 (Ex. F) squarely falls under the rule and the illustration set forth above. In the second paragraph of Exhibit F (R. 27), the Administrator writes:

War Assets Administration will make sale of this property to the bidder whose purchase proposal (a) meets and/or betters the terms and conditions of this formula for Acceptable Proposals on a competitive

basis and (b) best meets the objectives of the Surplus Property Act.

The Administrator did not reserve the right to reject bids for any reason or no reason at all in the letter to sell or the Formula for Acceptable Proposals (Ex. F, R. 23). No right to reject is found in Regulation 5 except when the bid is less than the fair value—

Regulation 5, Part 8305.19(a):

> Disposal agencies may reject any offer which is below the fair value of the property * * *.

Of course, in order to constitute an acceptance of the Administrator's offer to sell, a bid must comply with the terms and conditions of the sale, i.e., the letter to sell and the Formula for Acceptable Proposals (Ex. F, R. 23) and Regulation 5.

Petitioner's bid fully complied with all the terms and conditions of the sale and was an acceptance of the Administrator's offer to sell. The Tucker Corporation did not comply with the offer of respondent to sell and did not comply with the provisions of Regulation 5, Part 8305.19(d).

The Administrator realized that his offer to sell had been accepted by petitioner and he also realized that the bid of Missouri-Illinois Furnaces, Inc., would fail. It was apparent that he had no grounds upon which to disqualify the bid of petitioner. So the peculiar action of the Administrator in raising the fair value after opening and examining the bids becomes understandable. It was the only way for him to disqualify petitioner's bid—to bring it within the provisions of Regulation 5, Part 8305.19(a):

> Disposal agencies may reject any offer which is below the fair value of the property * * *.

If Regulation 5 or the Surplus Property Act contained any provision authorizing the Administrator to reject a bid for no reason at all, he would not have felt himself compelled to raise the fair value after the bids had been opened.

It is therefore clear that the Administrator's offer to sell said Plancor was an auction "without reserve," and that the bid of petitioner was an acceptance conditional on no more acceptable bid being received.

The bid of Missouri-Illinois Furnaces, Inc., failed with the result that the bid of petitioner was the only qualified acceptance of the Administrator's offer to sell. Therefore, a contract binding upon petitioner and the respondent was made so that the respondent can neither reject petitioner's acceptance of his offer nor withdraw the property from sale (Restatement of the Law of Contracts, Section 27).

B. *The Bid of Missouri-Illinois Furnaces, Inc., Failed*

1. Expiration of time limit.

The bid (Ex. A, R. 12) of Missouri-Illinois Furnaces, Inc., contained the following express conditions:

> 7. Title to the property included under Plancor 438 shall be delivered to us at a time to be mutually agreed upon *but not later than December 31, 1947.* (Italics supplied.) The property will be taken in its entirety on an "as is, where is" basis. The conveyance shall be made by quitclaim deed without warranty of title, express or implied.
>
> 11. *If such purchase is not completed by transfer of title to us prior to December 31, 1947,* there shall be refunded to us all amounts theretofore paid by us on account of the purchase price; the release by Koppers Company, Inc., of any obligations of War Assets Administration shall be ineffective; *and all other rights*

*and obligations hereunder shall be null and void.* (Italics supplied.)

Title was not delivered prior to December 31, 1947, nor was a quitclaim deed tendered to Missouri-Illinois Furnaces, Inc. Nor was such delivery prevented by injunction prior to December 31, 1947, because this action was not filed in the District Court until February 2, 1948.

After the happening of the condition, the bid of Missouri-Illinois Furnaces, Inc., expired and there was no contract upon which the respondent could base a sale to Missouri-Illinois Furnaces, Inc.

The action of the respondent in attempting to make a sale to Missouri-Illinois Furnaces, Inc., after December 31, 1947, constituted a new transaction which is contrary to the provisions of Regulation 5 and is in violation of the contract between respondent and petitioner.

This condition in the bid of Missouri-Illinois Furnaces, Inc., was not in conformity with the terms and conditions of the letter and Formula for Acceptable Proposals (Ex. F, R. 23) and it is therefore a new offer which is a rejection of the Administrator's offer to sell. *Noce, U. S. Dist. Engineer* v. *Edward M. Morgan Co.*, C.C.A. 8th Cir., 1939, 106 Fed. (2) 746. Of course, the acceptance of an offer may be qualified with a new condition such as the time limit in the bid of Missouri-Illinois Furnaces, Inc. If the condition is not fulfilled such acceptance may become, as in the language of the bid of Missouri-Illinois Furnaces, Inc., "null and void."

2. The bid of Missouri-Illinois Furnaces, Inc., violated the antitrust laws.

Congress provided in the Surplus Property Act of 1944 certain objectives set forth in Section 2 declared as objectives of the Act, one of which is as follows:

> (d) To discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns and the economy of free enterprise.

In order to prevent the development of monopolies, Congress further provided in Section 20 of said Act that in proceeding to sell to private interests surplus property which cost the Government a million dollars or more, the disposal agency should obtain the opinion of the Attorney General as to whether such proposed disposition would violate the antitrust laws. The term "antitrust laws" as used in Section 20 includes the Act of July 2, 1890 (Ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (Ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act; and the Act of August 27, 1894 (Ch. 349, secs. 73, 74, 28 Stat. 570), as amended.

In view of the fact that the Government is vitally interested in enforcing the acts of Congress *supra*, in preventing the growth and spread of monopolies, it would be very unreasonable indeed to permit the respondent, as an agent of the Government, to proceed to dispose of surplus property so as to increase the monopolistic control of corporations.

Congress realized that the observation and enforcement of the antitrust laws is a matter of national concern and in order to guard against the possibility that the respondent might make a sale to a monopoly and in violation of the antitrust laws, provided that he should first obtain the opinion of the Attorney General in regard to any proposed disposal of surplus property.

Accordingly, respondent referred the bid of Missouri-

Illinois Furnaces, Inc., to the Attorney General, who thereafter found that a sale of said Plancor to Missouri-Illinois Furnaces, Inc., would be in violation of the antitrust laws, and it was so stated by John F. Sonnett, Assistant Attorney General:

> "This Department reached the conclusion that the combination of the two companies growing out of the joint stock ownership of the proposed purchaser would, particularly because of the affiliations of Hanna Coal and Ore Company, result in violations of the antitrust laws." (Ex. I, 3rd par., R. 36).

Respondent should have immediately disqualified the bid of Missouri-Illinois Furnaces, Inc., when it was determined that the bid of Missouri-Illinois Furnaces, Inc., was in violation of the antitrust laws. It follows that the bid was illegal, and that respondent was entirely without authority under his own regulations and the statute to proceed to make a sale to Missouri-Illinois Furnaces, Inc.

However, this is exactly what the respondent proposes to do; that is, to predicate a sale upon a bid which has been found to be in violation of the law.

3. Respondent is presuming to make a sale without the requisite statutory approval of the Attorney General.

After the determination was made that the bid of Missouri-Illinois Furnaces, Inc., was in violation of the antitrust laws, the Department of Justice informed representatives of the two companies, i.e., Hanna Coal and Ore Company and Koppers Co., Inc. (Ex. I, 5th par., R. 37). Thereafter, a rapid exchange of letters took place.

Missouri-Illinois Furnaces, Inc., on January 14 sent a letter (Ex. C, R. 23) to respondent stating that Hanna Coal and Ore Co. would sell its stock in Missouri-Illinois Coal and Ore Co. to Koppers Co., Inc., and that thereafter

Missouri-Illinois Coal and Ore Co. would be dissolved and its property transferred to Koppers Co., Inc. The final paragraph of this letter stated:

> "A copy of this letter is being sent to the Attorney General of the United States since the changes herein outlined are made to conform to his views." (Ex. C, R. 24).

On the very same day, January 14, 1948, respondent replied by letter (Ex. D, R. 24) to Missouri-Illinois Furnaces, Inc., stating that he had no objection to Hanna Coal and Ore Company selling its stock in Missouri-Illinois Furnaces, Inc., to Koppers Co., Inc., and that he had no objection to the dissolution of Missouri-Illinois Furnaces, Inc., and the transfer of its property to Koppers Co., Inc. The next day, January 15, 1948, being the last day of the ninety-day period allowed in Section 20 of the Surplus Property Act for the Attorney General to render his opinion, an Acting Assistant Attorney General assumed to render an opinion in a letter (Ex. E, R. 26) to respondent stating that a sale of Plancor 438 to Missouri-Illinois Furnaces, Inc., as a wholly owned subsidiary of Koppers Co., Inc., would not be in violation of the antitrust laws. The Attorney General did not endorse his approval on this opinion, nor did he render an opinion.

The respondent thereupon, under the guise of the mere color of compliance with Section 20 of the Surplus Property Act, proceeded to make a sale of said Plancor to Missouri-Illinois Furnaces, Inc., or to Koppers Co., Inc., even though the representation in the letter of Missouri-Illinois Furnaces, Inc. (Ex. C, R. 23) was merely that Hanna Coal and Ore Company would sell its stock to Koppers Co., Inc.

The language of Section 20 of the Surplus Property Act is clear and unequivocal and requires that the disposal agency, the respondent, obtain the opinion of the Attorney

General. In 21 Opinions, Attorney General, 74, 1895, it was stated as follows:

> "The Attorney General must personally pass on every question so submitted to him for although he may * * * refer the question to a subordinate for a written opinion, the action of the subordinate must be examined and approved by the Attorney General to give it effect."

This direction and opinion is in accordance with the provisions of Title 5, U. S. C. A. 308. It is to be noted that officers of the Government may refer questions to the Department of Justice or to the Attorney General for opinions and that a subordinate in the Department of Justice may render an opinion. However, when the opinion of the Attorney General is specifically required, the Attorney General himself must render the opinion or, if he refers the question to a subordinate, he must endorse his approval thereon in order that the opinion shall have the force and effect of the opinion of the Attorney General (Title 5, U. S. C. A. 308).

As stated above, the Attorney General did not endorse his approval on the opinion (Ex. E. R. 26) of the Acting Assistant Attorney General nor did the Attorney General himself render any opinion approving the sale to Missouri-Illinois Furnaces, Inc.

It is perhaps significant to note that in this situation, involving a clear violation of the antitrust laws, the Attorney General properly refrained from rendering an opinion approving the sale after it was determined that the bid of Missouri-Illinois Furnaces, Inc., was in violation of the antitrust laws. It is also interesting to observe that it was an Acting Assistant Attorney General who undertook to clothe respondent with a thin veil of authority.

**4. Respondent is attempting to make a sale to a stranger to the bidding.**

As previously pointed out, the method in the sale of this property was that of securing sealed bids under strict qualifications and with full disclosure. When a bid failed, as did the bid of Missouri-Illinois Furnaces, Inc., it should have been rejected. The respondent had no power or authority under Regulation 5 of the Surplus Property Act to sell said Plancor to a party which had not filed a bid on October 6 pursuant to the letter (Ex. F, R. 23) offering said Plancor for sale. Koppers Co., Inc., had not filed a bid and acquired no legal right to enter into a contract to buy said Plancor. The change in stock ownership and the representation that Missouri-Illinois Furnaces, Inc., would be dissolved and its assets transferred to Koppers Co., Inc., is a flimsy and inadequate attempt which utterly fails to disguise the actual facts—that respondent is attempting to sell said Plancor to Koppers Co., Inc., a stranger to the bid.

5. Petitioner's bid constitutes the acceptance of respondent's offer to sell.

The bid of Missouri-Illinois Furnaces, Inc., was illegal and void. The bid of petitioner was the bid which best met the terms and conditions of respondent's offer to sell (Ex. F, R. 27), and was the bid which accepted respondent's offer. A contract was formed between petitioner and respondent for the sale of said Plancor to petitioner and respondent is obligated to proceed with the sale of said Plancor pursuant to the provisions of Regulation 5.

C. *This Action Is Against an Agent Who Is Presuming to Act Without Authority*

1. It is not a suit against the Federal Government.

This is not a case against the Federal Government but is an injunction sought against the illegal and unauthorized action of the respondent in his personal capacity as War Assets Administrator and Surplus Property Administrator from doing illegal actions in violation of public law and his own Regulations. The case, *United States* v. *Lee,* 106 U. S. 196, reaffirms the rule that an action will lie against an agent of the Government for improper action. This rule has been approved in:

*Philadelphia Company* v. *Stimson,* 223 U. S. 605, 619, 620; 32 S. Ct. 340, 56 L. Ed. 570;

*Goltra* v. *Weeks,* 271 U. S. 536, 545; 46 S. Ct. 613, 70 L. Ed. 1074;

*Ickes* v. *Fox,* 300 U. S. 96; 57 S. Ct. 412, 81 L. Ed. 525.

In the case of *Domestic and Foreign Commerce Corporation* v. *Littlejohn,* U. S. App. D. C., 1947, No. 9553, the Court had the following to say:

> "We have recently had occasion to scrutinize the doctrine of sovereign immunity as a 'jurisdictional' problem, and in doing so we deemed it expedient to adopt the careful analysis which had been previously made by Justice Stephens of this Court in his opinion (dissenting in part, concurring in part) in *Franklin Tp. in Somerset County, N. J.* v. *Tugwell,* 66 App. D. C. 42, 85 F. (2d) 208. For its obvious value in this case we repeat his finding, stated (66 App. D. C. 63; 85 F. (2d) 229) that:
>
> > 'Where a plaintiff asserts that an officer of the Government is acting without power and that therefore his acts are invalid, the Court in determining the preliminary jurisdictional question whether the United States is a necessary party (whether neces-

> sary parties are before a court is, of course, jurisdictional), is confronted with a peculiar procedural problem, or impasse, arising out of the fact that the determination of this question involves passing upon the very question involved in the merits. * * * Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are "so unsubstantial and frivolous as to afford no basis for jurisdiction . . .", (citing *Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897) and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties.' "

The principle of *Franklin Township* v. *Tugwell, supra,* wherein the Court affirmed the restraining of an invalid act by a Government official relied also upon the following authorities:

*Payne* v. *Central Pac. Ry. Co.*, 228 U. S. 228, 41 S. Ct. 314, 65 L. Ed. 598;

*Northern Pac. Ry. Co.* v. *N. D.*, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897;

*Wells* v. *Roper,* 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755;

*Lane* v. *Watts,* 234 U. S. 525, 34 S. Ct. 965, 58 L. Ed. 1440;

*U. S.* v. *Lee,* 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171;

*Transcontinental & Western Air* v. *Farley,* C. C. A. (Cert. denied) 71 F. (2d) 288, 293 U. S. 603, 55 S. Ct. 119, 79 L. Ed. 695.

In the case of *First National Bank of Holdenville* v. *Ickes*, 1946, 54 F. (2d) 851, 81 U. S. App. D. C. 61, the Appellate Court again repeated the principle as follows:

> "When a complainant avers lack of official power and the defendant officer counters with an assertion of power and governmental interest in the property involved, a procedural dilemma is presented which the Courts have resolved in the manner indicated."

The principle was repeated in the case of *Wilbur, Secretary of Interior* v. *Secretry ex rel. Krushic*, 1930, 280 U. S. 806, 50 S. Ct. 103, 74 L. Ed. 445, where the court said:

> "In this case the Secretary interpreted and applied a statute in a way contrary to its explicit terms and in so doing departed from a plain official duty. A writ of mandamus should issue directing a disposal of the application for patent on its merits, unaffected by the temporary default in the performance of assessment labor for assessment year 1920."

See also *Red Canyon Sheep Company* v. *Ickes*, 1938, 69 App. D. C. 77, 98 F. (2) 308, and *Ferras* v. *Wilbur*, 27 Fed. (2d) 262, where Judge Parker stated:

> "Where an act is unauthorized, the person attempting it may be restrained regardless of the claim that he is acting in his official duty."

In *Appalachian Electric Power Co.* v. *Smith*, District Court of Virginia, 1933, 4 F. Supp. 6, the court said:

> "The test is whether the persons sued in taking the action complained of have acted within or in excess of their lawful authority."

In *Philadelphia Co.* v. *Stimson, Secretary of War*, 223 U. S. 605, at page 619, it is said:

> ". . . and in case of injury rendered by his illegal action the officer cannot claim immunity from injunc-

tion process. The court is not asked to interfere with the official duties of the Secretary of War. It rests upon the charge of abuse of power. It is not a suit against the United States."

In the case of *Board of Liquidation* v. *McComb*, 92 U. S. 531, 23 L. Ed. 623 Mr. Justice Bradley said:

> "But it has been well settled that when a plain official duty requiring no exercise of discretion is to be performed and performance is refused, any person who will sustain personal injury thereby for which adequate compensation can be had at law, may have an injunction to prevent it. In such cases the writ of mandamus and injunction are somewhat correlative to each other."

See also, *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784.

In two late cases, *Dollar* v. *Land*, 1946, 154 Fed. 307, 81 U. S. App. D. C. 28, and *Domestic and Foreign Commerce Corporation* v. *Littlejohn*, 165 Fed. 2nd, 235 (App. D. C. 1947) the Court of Appeals held that action could be maintained against an agent of the Government. In *Dollar* v. *Land* it was alleged that the agent of the Government was attempting to sell certain property held by him under a contract of pledge to secure a debt which had been paid. In *Domestic and Foreign Commerce Corporation* v. *Littlejohn*, it was alleged that plaintiff had entered into a contract with the agent for the sale of certain property which the agent was attempting to sell to another party. In both cases the Court of Appeals affirmed the rule that action can be maintained against an agent of the Government who is seeking to dispose of property in violation of his contract with the plaintiff.

In the case at bar petitioner had entered into a contract with respondent and is entitled to maintain an action against respondent and to prevent the sale by respondent of said property to another party.

D. *The Complaint Justifies Equitable Relief, Because:*

1. The property, in part, consisted of real property, and is unique and irreplaceable.

The Government brochure (Ex. G, R. 26) stated that the property consisted of several tracts of land, 210.70 acres, of which 90 acres were actually in use. There was a battery of forty-nine (49) by-products ovens, together with a blast furnace plant, coke by-products plant, railroad facilities, four plant structures and plant utilities. It is a type of structure that is unique and by virtue of its proximity to sources of supply of iron ore, it was unique and irreplaceable. The powers of equity are accordingly appropriate in this particular field. In connection with this proposition see *Columbian Cat Fanciers, Inc.*, v. *Koehne, et al.*, 1938, 68 App. D. C. 257, 260, 96 F. (2d) 529, where the Court stated:

> "It is elementary that 'the jurisdiction of equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer in the same circumstances.' *Kilbourn* v. *Sunderland*, 1889, 130 U. S. 505, 514, 9 S. Ct. 594, 596, 32 L. Ed. 1005; *Boyce's Executors* v. *Grundy*, 1830, 3 Pet. 210, 215, 7 L. Ed. 655; *Spignul* v. *Blundon*, 1923, 53 App. D. C. 29, 30, 287 F. 1006. ' "Adequate remedy at law" means a remedy vested in the complainant, to which he may at all times resort at his own option, fully and freely, without let or hindrance.' *Beach* v. *Beach Hotel Corp.*, 1933, 117 Conn. 445, 453, 168 A. 785, 788; *Wheeler* v. *Bedford*, 1886, 54 Conn. 244, 249, 7 A. 22, 24."

2. Money damages would be speculative and difficult of proof.

The petitioner would be without relief at law since money damages would be inadequate and it would be extremely difficult to prove the extent of such damages. It is readily

apparent from the record that the property in question is unique and that an action for damages would provide inadequate relief coupled with speculative damages, and therefore injunctive relief is the proper remedy in the premises.

WHEREFORE, the premises considered, it is respectfully submitted that this Court should issue its writ of certiorari.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 438

FULTON IRON COMPANY, A CORPORATION,
PETITIONER

*v.*

JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The order of the District Court for the District of Columbia dismissing the complaint was entered without an opinion (R. 55). The opinion of the Court of Appeals for the District of Columbia Circuit (R. 71) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1948 (R. 77). The petition for a writ of certiorari was filed on November 29, 1948. The jurisdiction of this Court presumably is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether petitioner, an unsuccessful bidder under an invitation to submit bids for the purchase of certain surplus realty belonging to the United States, has standing to maintain the instant suit.

2. Whether the United States, which has not given its consent to be sued, is the real party in interest or an indispensable party which has not been impleaded.

## STATUTE AND REGULATION INVOLVED

The applicable provisions of the Surplus Property Act of 1944, 58 Stat. 765, as amended, 50 U. S. C. App. 1611–1646, and the pertinent provisions of War Assets Administration Regulation 5 are set forth in the Appendix, *infra,* pp. 26–36.

## STATEMENT

On September 13, 1947, the War Assets Administration issued an invitation for purchase proposals of certain surplus property designated by War Assets Administration as "Plancor 438" (R. 27–31). "Plancor 438" is an industrial plant, situated on a tract of land of more than 210 acres at Granite City, Illinois, which comprises two blast furnaces and a battery of by-product ovens producing coke and related products for use in the manufacture of pig iron (R. 32). These facilities are owned by the Government and were formerly operated under a lease by Koppers Company, Inc. They are now operated by Missouri-

Illinois Furnaces, Inc., under a contract of sale of October 29, 1947, with the War Assets Administration.

The invitation to bid fixed the minimum purchase price at $2,250,000, and set forth a great number of terms and conditions that the purchaser must meet (R. 28–31).

Prior to the invitation, in March 1947, Brassert & Company, engineering specialists, which had made a detailed study of the facilities comprising "Plancor 438" at the request of the War Assets Administration, submitted a report estimating the fair value of the property at $2,520,000 (R. 33). The Report of the Engineers of the War Assets Administration on March 28, 1947, estimated the fair value of the property at $3,250,000 (R. 33). On September 6, 1947, the Appraisal Division of W. A. A. in a memorandum to the Real Property Board summarized the estimates previously submitted and concluded that "the minimum Fair Value of the plancor should not be less than $2,500,000" (R. 33–34). As pointed out above, the invitation for purchase proposals without reference to fair value or intrinsic worth fixed the minimum purchase price at $2,250,000.

On October 6, 1947, following the invitation for proposals of September 13, 1947, three purchase proposals were received as follows:

| | |
|---|---|
| Missouri-Illinois Furnaces, Inc. | $3,255,000 |
| Tucker Corporation | 2,751,000 |
| Fulton Iron Company | 2,750,000 |

On October 10, 1947, in an intra-agency memorandum by the Appraisal Division to the Real Property Review Board, the prior fair value estimates were set forth without comment (R. 35). On October 29, 1947, the purchase proposal of the Missouri-Illinois Furnaces, Inc., was accepted by the War Assets Administration in a letter of intent (R. 41–47) subject to the conditions set forth therein. This letter of intent, with the conditions therein imposed, was, in turn, accepted by Missouri-Illinois Furnaces, Inc., on the same day (R. 47).

Under the terms of this agreement, the purchaser agreed to pay to the seller a total consideration of $3,255,000, of which 20 percent was to be paid as a minimum down payment and the remainder of the purchase price paid by installments with interest over a maximum period of ten years commencing three months after closing. The contract also provided that the taxes be prorated; that agreements be executed between the lessee and the purchaser with respect to the release of certain obligations which War Assets Administration had with the lessee; that an agreement be executed by Koppers Company, Inc. (the lessee) and Hanna Coal and Ore Corporation, the owners of the capital stock of Missouri-Illinois Furnaces, Inc., guaranteeing the unpaid balance of the purchase money (R. 43–44).[1] The contract further provided

[1] The appropriate executed agreements of Koppers Company, Inc., and Hanna Coal and Ore Corporation were attached (R. 48, 49).

that "upon acceptance of this letter of intent and payment of six hundred fifty-one thousand dollars ($651,000) representing the down payment, Seller shall transfer possession of the facilities to Purchaser effective as of midnight October 31, 1947, which shall be the effective date of sale. From and after effective date of sale, Purchaser will be responsible for the property sold and assume all losses and will hold the Seller harmless from any and all liabilities arising out of the use and occupancy of said premises" (R. 44).

The provision contained in the proposal of Missouri-Illinois Furnaces, Inc., that the title was to be transferred by December 31, 1947, or the purchase price refunded and all rights and obligations under its proposal null and void, was superseded by the letter of intent of the WAA of October 29, 1947, which provided that "complete title to the plancor property is to be conveyed by quitclaim deed, and, if necessary, in addition thereto a bill of sale, on a date to be mutually agreed upon, not later than sixty (60) days after clearance by the Department of Justice, unless such time limitation is extended by mutual consent" (R. 42).

Under the terms of the agreement as set forth in the letter of intent, the purchaser agreed among other conditions not to sell or lease the same within a period of two years from the date of the completed transaction without first obtain-

ing the written authorization of the seller to such sale or lease (R. 46). The agreement was made subject to the following conditions: (1) compliance with the requirements of War Assets Administration Regulation 5, including amendments thereto; (2) advice by the Department of Justice that the proposed sale is not violative of the antitrust laws of the United States; (3) any other legal requirements deemed necessary by the Real Property Division, Office of the General Counsel (R. 46–47). The agreement also contained other terms and conditions not here relevant. In closing, the agreement provided (R. 47):

> The sale of the entire facilities of plancor 438 is approved on the terms above stipulated only, which terms and conditions exclusively govern the entire commitment of War Assets Administrator.

The proposed sale was then submitted to the Department of Justice for an opinion as to its effect on the antitrust laws as provided in Section 20 of the Surplus Property Act of 1944 (50 U. S. C. App. 1629). Missouri-Illinois Furnaces, Inc. was an Illinois corporation whose capital stock was owned in equal shares by Koppers Company, Inc. and Hanna Coal and Ore Corporation. Because of the informal objection by the Department of Justice that this combination would violate the antitrust laws (R. 36–37), the company, on January 14, 1948, wrote to the

War Assets Administration stating that Koppers Company, Inc. had agreed to purchase all of the stock of Missouri-Illinois Furnaces, Inc. owned by Hanna Coal and Ore Corporation, effective as of the close of business on January 31, 1948. It further stated that Koppers Company, Inc. would assume the obligations of the Hanna Coal and Ore Corporation and guarantee the full amount of the mortgage debt of Missouri-Illinois Furnaces, Inc. (R. 23, 24). In reply, the War Assets Administration advised that the proposed modification of stock ownership was unobjectionable to the Administration (R. 25).

On the basis of this exchange of letters and after reviewing the memoranda submitted with respect to the proposed sale, on January 15, 1948, the last day of the ninety-day period allowed in Section 20 for an opinion, the Acting Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, in a letter to the War Assets Administration, stated that consummation of the proposed sale to Missouri-Illinois Furnaces, Inc., as a wholly owned subsidiary of Koppers Company, Inc., would not be regarded as a violation of the antitrust laws (R. 26–27).

Before the completion of the transfer of the title papers under the agreement of October 29, 1947, the Fulton Iron Company, on February 2, 1948 (R. 57), filed its complaint in the District Court to enjoin the War Assets Administrator from completing the transfer (R. 1–11). The

District Court denied successively petitioner's motion for a temporary restraining order, a temporary injunction, and a motion for an injunction pending appeal; and granted respondent's motion to dismiss the complaint on March 11, 1948 (R. 50–54). The Court of Appeals granted petitioner's motion for an injunction pending appeal on May 7, 1948 (R. 77). It affirmed the decision of the District Court on October 13, 1948 (R. 77), in an opinion holding that petitioner, having only the status of a disappointed bidder, lacked capacity to sue, and that the United States, which had not consented to be sued, was an indispensable party.

Thereafter, petitioner filed its motion in the Court of Appeals to stay the mandate and to continue the temporary injunction pending application for a writ of certiorari. Respondent opposed with the request that sufficient bond be required of petitioner. The court below, on November 2, 1948, ordered that the mandate be stayed, continuing the temporary injunction theretofore entered in full force and effect without bond (R. 83). Respondent then filed a motion (R. 84) for a withdrawal or modification of certain portions of the court's opinion of October 13, 1948 (R. 71),[2]

[2] The purpose of this motion, which is set forth in full in the record (R. 84–87), was to seek to persuade the court below to delete from its opinion certain statements and observations which respondent deems to be objectionable and which are without support in the record. The statements without sup-

which petition the court denied on November 10, 1948 (R. 94).

## ARGUMENT

Petitioner seeks review of the decision below, not only on the ground that it was incorrect, but also on the ground that the basic question involving the discretion of the Administrator in disposing of surplus property is a matter of national concern (Pet. pp. 11–12). We submit, however, that, although the question of judicial restraint of the property disposal policies of the Govern-

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port in the record are those to the effect that respondent "arbitrarily raised the fair value [of Plancor 438] from $2,500,000 to $3,250,000" (R. 72; see also R. 74). So far as the record shows, no change in the fair value of $2,500,000 fixed on September 6, 1947 (R. 32–34) has been made. The memorandum of October 10, 1947 (R. 34–35) merely recites again the two valuations discussed in the memorandum of September 6, without in any way recommending any change or the adoption of either. Both of these memoranda, submitted by petitioner as exhibits to its complaint, override the allegations of Paragraph 7 of the complaint (R. 2), that such an increase had been made. Moreover, any such increase was unnecessary for the bid of Missouri-Illinois was the highest bid and exceeded not only the fair value of $2,500,000 but also the figure of $3,250,000, and for reasons set forth, *infra*, pp. 15–20, that bid was valid. Finally, characterization of responsible officials' action as "skulduggery" (R. 73) should not be made on the type of record here presented, comprised exclusively of allegations which are contradicted by petitioner's own exhibits, particularly where the officials in question sought only to sell the surplus property to the firm which was not only the highest bidder and was of proven financial responsibility, but which undertook to utilize the property in what the officials considered to be the best interest of the national economy.

ment is a question of general importance, it is not a novel one. The decision below is correct, and accords with the long settled rulings of this Court that judicial interference with executive discretion would "be productive of nothing but mischief." *Decatur* v. *Paulding*, 14 Pet. 497, 516; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–128. No reason for further review therefore exists.

Petitioner's case is that it has a contract with the respondent for the sale to petitioner of Plancor 438, and that it is entitled in effect to specific performance of that contract. We submit that the facts clearly show that respondent not only did not contract to sell Plancor 438 to petitioner, but also that respondent entered into such a contract with another and higher bidder for the property. Absent such a contract, petitioner lacks standing to sue. Further, even if there was a contract of sale between petitioner and respondent, the United States is the real party in interest and an indispensable party. Since the United States has not consented to be sued, the petitioner's suit cannot be maintained.

1. It is fundamental that petitioner must demonstrate its standing to sue before it can contest the validity of the action taken by respondent. Petitioner must show that such conduct invades a private substantive, legally protected interest, an interested recognized at common law or created by statute, or the suit must fail for want of a jus-

ticiable controversy. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700–701 (C. A. 2). It is conceded by petitioner herein that "The petitioner's capacity to sue depends upon the question whether petitioner had entered into a contract with respondent" (Pet. p. 14).

By means of what the court below characterized as an ingenious but entirely unsound argument, petitioner has endeavored to establish the existence of a contract between it and respondent. Distorting the meaning of the invitation for purchase proposals for this industrial plant which was issued by respondent, petitioner contends that the disposal procedure in this case was not merely analogous to an auction but was, in fact, an auction without reserve covered by Section 21 of the District of Columbia Uniform Sales Act (Pet. p. 16).[3] Thus, it is asserted by petitioner that respondent made an offer to sell and that the bid of petitioner was an acceptance creating contractual rights conditioned upon no more acceptable bid being received (Pet. p. 19). It then contends that its bid was the only qualified acceptance of the offer to sell, the bid of Missouri-Illinois

[3] Aside from the fact that the Uniform Sales Act does not apply to a sale of real property, this question is one of federal, rather than local, law. *Caldarola* v. *Eckert*, 332 U. S. 155, 158; *United States* v. *Allegheny County*, 322 U. S. 174, 185; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367; *Girard Trust Co.* v. *United States*, 149 F. 2d 872, 874 (C. A. 3).

Furnaces, Inc. having failed allegedly because it contained an express condition, which was not met, of a time limit for the passage of title (Pet. pp. 19–20); because it violated the antitrust laws (Pet. pp. 20–22); because the requisite statutory approval of the Attorney General had not been obtained (Pet. pp. 22–24); and because the change in stock ownership of Missouri-Illinois Furnaces, Inc. transforms that entity into a stranger to the bid (Pet. p. 25).

a. Even if it were assumed *arguendo* that the bid of Missouri-Illinois Furnaces, Inc. failed, petitioner's position is nevertheless untenable. It is well-settled commercial law that a contract to sell, or a sale, is not concluded until the bids which result from the invitation to bid extended by a government official or a private owner have been inspected and the best bid accepted. Until acceptance of his bid, the bidder acquires no title to or interest of any nature in the property. *Blossom* v. *Railroad Co.*, 3 Wall. 196; see also *Semmes* v. *United States*, 91 U. S. 21, 26; *Camden* v. *Mayhew*, 129 U. S. 73, 82; *In re Realty Foundation*, 75 F. 2d 286 (C. A. 2d).

By the terms of the letter of September 13, 1947, petitioner and others were "invited to submit a proposal in accordance with the terms and conditions and information requested in the enclosed Formula." (R. 28.) The invitation stated that "War Assets Administration will make sale of this property to the bidder whose purchase

proposal (a) meets and/or betters the terms and conditions of this Formula * * * on a competitive basis and (b) best meets the objectives of the Surplus Property Act" (R. 27). The Formula set forth in considerable detail the various terms and conditions required of prospective bidders and provided that the bidder might propose additional consistent terms and conditions (R. 29–31).

Clearly this invitation to bid did not transform the Administrator into an auctioneer, hammer in hand, who was without power to refuse to sell to petitioner. The discretion necessarily vested in the Administrator to dispose of surplus property so as to effectuate the objective of the Act[4] precludes any such conception. The very admission of petitioner that "the amount of the bid is subordinate to the other objectives of the Act" (Pet. 16)[5] contradicts its assertion that this was an auction without reserve. It should also be noted that the complaint itself is likewise at variance with petitioner's theory of an auction without reserve. Paragraph 22 complains that respondent failed to notify unsuccessful bidders, including petitioner, that they might *renew* their offers (R. 9), and the prayer for relief (R. 10) requests

[4] The objectives are set forth in Section 2 of the Act (50 U. S. C. App. 1611).

[5] The court below found "There was wide discretion vested by the Act in the Administrator in disposing of the surplus property and there were other objectives than price which must lawfully and properly be taken into consideration" (R. 75).

that respondent be ordered to *negotiate* for the sale of the property on the basis of a new bid made by petitioner on January 12, 1948 (R. 6)—neither of which would be either relevant or material if a contract to sell had been made.

On October 6, 1947, three proposals had been submitted in accord with the terms of the invitation. Petitioner's offer was lowest; that of Missouri-Illinois Furnaces, Inc., was highest. WAA accepted the bid of Missouri-Illinois; it did not and has not accepted the bid of petitioner. It follows that petitioner has not established any infringement of a contractual right. The principle is basic that the submission of an offer for a contract with a public agency creates no rights in the offeror, regardless of the statutory restrictions limiting the manner in which the contract may be let.[6] *Colorado Paving Co.* v. *Murphy,*

[6] As the court below observed in treating another aspect of this case (R. 76) "The case which to us seems absolutely controlling on this point is the celebrated case of *United States ex rel. Goldberg* v. *Daniels*," 231 U. S. 218. In that case, the Navy advertised for proposals of purchase of a cruiser. Goldberg was the highest bidder, bidding more than the appraised amount and tendering payment of the whole sum. Secretary Daniels, having in the meantime decided to accede to the request of the State of Oregon to lend the old cruiser to that State as a training vessel, refused to deliver the vessel and returned the check to Goldberg. Goldberg petitioned for mandamus to compel delivery of the cruiser; Daniels in his answer admitted the facts as stated but set up the defense that the bid was not an acceptance of an offer but was itself only an offer, subject to be accepted or not at the discretion of the Secretary of the Navy. The Court of Appeals for the

78 Fed. 28 (C. A. 8), appeal dismissed, 166 U. S. 719; *Champion Coated Paper Co.* v. *Joint Committee on Printing of Congress,* 47 App. D. C. 141; *B. F. Cummins Co.* v. *Burleson,* 40 App. D. C. 500; *Martin* v. *United States,* 61 C. Cls. 430; *Strong* v. *United States,* 6 C. Cls. 135.

b. Even if we were to accept the strained conception of petitioner that the procedure herein involved was an auction without reserve, petitioner still lacks standing to sue because the bid of Missouri-Illinois Furnaces, Inc., has not failed.

(1) A reading of the invitation establishes that WAA was soliciting proposals to purchase the property, not in strict compliance with rigid specifications permitting of no alteration, but within the limits framed by the Formula, and the proposals were submitted on that basis. As pointed out by petitioner, Paragraph 7 of the Missouri-Illinois Furnaces, Inc., proposal stated, "Title to the property * * * shall be delivered to us at a time to be mutually agreed upon, but not later than December 31, 1947" (R. 15). And Paragraph 11 provided, "If such purchase is not completed by transfer of title to us prior to December 31, 1947, * * * all other rights and obligations hereunder shall be null and void" (R.

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District of Columbia, upon Goldberg's demurrer to the answer, dismissed the petition on the ground that the discretion of the Secretary was not ended by the receipt and opening of the bids even though they satisfied all the conditions prescribed.

16). Since title was not delivered prior to December 31, 1947, petitioner contends the bid of Missouri-Illinois Furnaces, Inc., became null and void and therefore failed (Pet. pp. 19–20).

Even aside from the fact that these provisions were inserted in the purchase proposal by Missouri-Illinois for its protection and, therefore, were waivable by it, petitioner has misinterpreted the effect of the transactions between the Government and Missouri-Illinois. On October 29, 1947, that condition disappeared with the acceptance by Missouri-Illinois of the letter of intent and the conditions therein imposed by WAA (R. 41–47). The resulting contract of sale set forth in detail all of the terms and conditions as to the sale of this property, "which terms and conditions exclusively govern the entire commitment of War Assets Administrator" (R. 47). Paragraph 8 of the contract provides, in part:

> * * * From and after effective date of sale, Purchaser will be responsible for the property sold and assume all losses and will hold the Seller harmless from any and all liabilities arising out of the use and occupancy of said premises. *Subject only to final completion of transfer of title by Seller to Purchaser, as herein provided, Purchaser shall be in all respects deemed the owner of the facilities,* and shall be responsible for all insurance coverage, taxes, and assessments, including pro rata of 1947 taxes for the period from the effective

> date of sale to December 31, 1947; maintenance costs and other expenses accruing in connection with such facilities or the operation thereof. From and after said date, Seller shall have no further financial responsibility in regard to such facilities of any nature whatsoever. [Italics supplied.]

Thus, a complete contract of sale of the property between the United States and Missouri-Illinois Furnaces, Inc., was entered into and consummated before the expiration of the December 31, 1947, deadline for transferring title contained in the proposal. The time for conveying title, by the express terms of the contract, was to be "not later than sixty (60) days after clearance by the Department of Justice, unless such time limitation is extended by mutual consent" (R. 42). To talk about December 31, 1947, is to ignore the binding commitment entered into on October 29, 1947. Whether conditional or unconditional, such letters "would be classed as contracts and enforceable." See *Garfielde* v. *United States,* 93 U. S. 242; *American Smelting Co.* v. *United States,* 259 U. S. 75; *United States* v. *Purcell Envelope Co.,* 249 U. S. 313. Williston, *Contracts* (Revised Edition, 1945, Vol. 9, War Contract Claims), Section 198 and footnote 5.

(2) The proposed sale was then submitted to the Department of Justice for an opinion as to its effect on the antitrust laws, as provided in Section 20 of the Surplus Property Act (50

U. S. C. App. 1629). Missouri-Illinois' capital stock was owned in equal shares by Koppers Company, Inc., and Hanna Coal and Ore Corporation. Because of this joint ownership, the Department informally reached the conclusion that the combination of the two companies would, particularly because of the affiliations of the Hanna Coal and Ore Corporation, result in violations of the antitrust laws, but made no ruling thereon (R. 36–37). Despite the absence of any official action by the Department of Justice affirming this informal conclusion, petitioner urges that the Administrator should have immediately disqualified the bid of Missouri-Illinois Furnaces, Inc. (Pet. p. 22). This contention of petitioner ignores the fact that the informal conclusion was followed by a formal ruling complying in full with Section 20. On January 14, 1948, Missouri-Illinois wrote to WAA stating that Koppers had agreed to purchase all the stock of Missouri-Illinois owned by Hanna Coal and Ore Corporation, effective as of the close of business on January 31, 1948 (R. 23–24). Upon the basis of this information, the Acting Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, in a letter of January 15, 1948, the last day of the ninety-day period allowed in Section 20 for an opinion thereon, stated that "we would not regard consummation of the proposed sale to the Missouri-Illinois Furnaces, Inc., as a wholly owned

subsidiary of the Koppers Company, Inc., to be a violation of the antitrust laws" (R. 26–27).

(3) Relying upon the fact that the letter was signed by an Acting Assistant Attorney General and that the Attorney General did not endorse his approval thereon, petitioner contends that the opinion did not meet the requirements of Title 5 U. S. C. 308 and was, therefore, "the mere color of compliance with Section 20 of the Surplus Property Act" (Pet. pp. 23–24). However, this contention is without merit since Section 8 of the Surplus Property Act (50 U. S. C. App. 1617) specifically authorizes the head of any government agency to delegate and redelegate to any employee of such agency the duties imposed by that Act. The Attorney General's duties under Section 20 of the Surplus Property Act have been delegated to the Decree and Surplus Property Section of the Antitrust Division, 11 F. R. 177a–103 (§ 51.21 (g)).

(4) Petitioner's final reason for urging that the bid of Missouri-Illinois failed—the sale of 50 percent of its stock by Hanna Coal & Ore Corporation to Koppers Company on January 31, 1948—is frivolous. Aside from the fact that Missouri-Illinois, a corporation, has continuously remained the same legal entity, it is apparent that the change in stock ownership did not occur until after the formation of a binding and definitive contract on October 29, 1947. Moreover, even as-

suming a change of corporate identity, Paragraph 12 of the contract (R. 46) specifically contemplates and provides for the transfer of this property to persons other than Missouri-Illinois, with the approval of the Administrator. Further, Paragraph 16 of the contract (R. 46) specifically permits Missouri-Illinois, with the approval of the Administrator, to assign either the agreement or its rights thereunder. Since the Administrator was advised of the change in ownership on January 14, 1948 (R. 23–24) and approval was granted on the same day (R. 24–25), it cannot be seriously asserted that a change in the corporate identity of Missouri-Illinois, if it had occurred, would be relevant.

(5) Even assuming that the bid of Missouri-Illinois failed, there is no basis for the assertion of petitioner that "The bid of petitioner was the bid which best met the terms and conditions of respondent's offer to sell * * * and was the bid which accepted respondent's offer" (Pet. p. 25). Petitioner thereby ignores the very objection it is making as to the bid of Missouri-Illinois—no bid can "accept[ed] respondent's offer" until the Department of Justice has ruled that it would not be violative of the antitrust laws. Petitioner has not shown that its proposal would be cleared by the Department of Justice.

To summarize, in order for petitioner to show that it has standing to sue, it must prove that it has a contract with respondent (Pet. p. 14). We

submit that the bid of petitioner was not an acceptance of an offer made by the Administrator at an auction without reserve, but was itself an offer made in response to an invitation to bid issued by respondent. Since the Administrator not only has not accepted petitioner's offer but has entered into a valid contract with Missouri-Illinois, petitioner has no standing to sue.

2. Even assuming that petitioner has a valid contract for the sale to it of Plancor 438, it cannot bring suit against the United States. Although petitioner characterizes this action as one for an injunction against the alleged illegal and unauthorized action of respondent (Pet. p. 26), and the United States is not named as a party, the complaint on its face shows that, in all but the defendant's name,[7] the suit is, in effect, one to compel specific performance by the United States, which has not consented to be sued.[8] In its prayer for relief, petitioner requests the court to decree that "Defendant negotiate with plaintiff for the sale of said Plancor 438 by defendant

[7] In determining whether the suit is against the sovereign, it is, of course, immaterial that the sovereign is not named as a party defendant. *Ex parte New York*, 256 U. S. 490, 500; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459, 464.

[8] It may well be that Missouri-Illinois is an indispensable party to this action because of its contract of purchase for this plant. *Brady* v. *Work*, 263 U. S. 435. See also *Ducker* v. *Butler*, 104 F. 2d 236, 238, 239 (App. D. C.).

to plaintiff for the same price and terms of payment as set forth in said bid of Missouri-Illinois Furnaces, Inc." (R. 10). Although all cases in the field of sovereign immunity cannot be reconciled, the rule is firmly established that the federal courts have no jurisdiction to entertain proceedings seeking specific performance of the sovereign's contract, especially when the passage of title is not alleged. *Belknap* v. *Schild,* 161 U. S. 10, 18; *Tindal* v. *Wesley,* 167 U. S. 204, 219; *Ex parte Young,* 209 U. S. 123, 151–152; *Hopkins* v. *Clemson College,* 221 U. S. 636, 642; *Goldberg* v. *Daniels,* 231 U. S. 218; *Wells* v. *Roper,* 246 U. S. 335; *Ex parte New York,* 256 U. S. 490, 500; *Goltra* v. *Weeks,* 271 U. S. 536, 546; *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371. By the Tucker Act and the Federal Tort Claims Act, the United States has provided a forum which can award money damages against the Government for breach of contract and for certain types of tort, but, as these cases hold, the United States has not yet permitted itself to be sued for specific performance.

The long history of suits against the United States and its agencies and officers shows with abundant clarity that merely to assail the officer's authority will not alter the rule that a suit in which the relief sought or granted will finally determine or interfere with the Government's title, possession, or use of property, is a suit against the United States. *Belknap* v. *Schild,*

161 U. S. 10; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601; *Goldberg* v. *Daniels,* 231 U. S. 218;* *Lankford* v. *Platte Iron Works,* 235 U. S. 461, 476; *New Mexico* v. *Lane,* 243 U. S. 52, 58; *Morrison* v. *Work,* 266 U. S. 481, 485–488; *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371; *Krug* v. *Fox,* 161 F. 2d 1013 (C. A. 4).

Petitioner points particularly to two recent cases, *Land* v. *Dollar,* 330 U. S. 731, and *Domestic and Foreign Commerce Corporation* v. *Littlejohn,* 165 F. 2d 235 (App. D. C.), now awaiting decision in this Court *sub nom. Larson* v. *Domestic and Foreign Commerce Corporation,* No. 31, wherein it was held that action could be maintained against an agent of the Government. For several reasons, the line of authorities leading up to the *Land* decision does not apply. First, the *Land* opinion expressly distinguishes an "attempt to get specific performance of a contract to deliver property of the United States" (*Id.* p. 737). Secondly, the *Land* theory requires the complainant to state a private common-law tort against the defendant, but petitioner neither as-

* In *Goldberg* v. *Daniels,* which the court below found to be here controlling in this aspect of the case (see note 6 *supra*), Mr. Justice Holmes said:

"We see no sufficient reason for thowing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the owner in posession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail" (231 U. S. at p. 221).

serts such a claim in its complaint, nor could it do so. Thirdly, another fundamental factor in the *Land* authorities is the complainant's claim that the property never belonged to the United States, coupled with an acknowledged substantial interest in the property, and possession of it, before the United States asserted any claim. Here petitioner does not go so far as to assert any property interest at all. Lastly, the judgments in the *Land* line of cases would not affect the rights of the absent United States, while petitioner's prayer that "Defendant negotiate with plaintiff" would, if granted, necessarily alter the status of the Government's ownership of the property. And, as to the *Domestic and Foreign Commerce Corporation* case, it is significant that the Court below, consisting of the same three judges who sat in the *Land* and *Domestic and Foreign Commerce Corporation* cases, in an opinion written by the author of the opinions in those two cases, held that neither were in point in the instant case (R. 75–76).

In conclusion, it should be noted that petitioner, in demanding that the court order "Defendant [to] negotiate with plaintiff," is asking that the extraordinary power of equity be exercised to control executive discretion. That the disposal of surplus property by the Administrator is a discretionary and not a ministerial act needs no elaboration. Since only a plainly ministerial act can be controlled by a mandatory injunction, settled judicial practice precludes judicial intervention

here. *Decatur* v. *Paulding,* 14 Pet. 497, 516; *Goldberg* v. *Daniels,* 231 U. S. 218; *Adams* v. *Nagle,* 303 U. S. 532, 542; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 127–128.

## CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should, therefore, be denied.

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JANUARY 1949.

## APPENDIX

The pertinent provisions of the Surplus Property Act of October 3, 1944, 58 Stat. 765, as amended by Section 2 of the Act of September 18, 1945, 59 Stat. 533, 50 U. S. C. App. 1611–1646 are:

> Sec. 2. The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—
>
> (a) to assure the most effective use of such property for war purposes and the common defense;
>
> (b) to give maximum aid in the reestablishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment;
>
> (c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;
>
> (d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;
>
> (e) to foster and to render more secure family-type farming as the traditional and desirable pattern of American agriculture;
>
> (f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;

(g) to encourage and foster post-war employment opportunities;

(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;

(i) to establish and develop foreign markets and promote mutually advantageous economic relations between the United States and other countries by the orderly disposition of surplus property in other countries;

(j) to avoid dislocations of the domestic economy and of international economic relations;

(k) to foster the wide distribution of surplus commodities to consumers at fair prices;

(l) to effect broad and equitable distribution of surplus property;

(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;

(n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act (without discriminating against the establishment of new enterprises);

(o) to promote production, employment of labor, and utilization of the productive capacity and the natural and agricultural resources of the country;

(p) to foster the development of new independent enterprise;

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;

(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;

(s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; and

(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

Sec. 3. As used in this Act—

(a) The term "Government agency" means any executive department, board, bureau, commission, or other agency in the executive branch of the Federal Government, or any corporation wholly owned (either directly or through one or more corporations) by the United States.

* * * * *

Sec. 8. The head of any Government agency, except the Surplus Property Administrator, may delegate, and authorize successive redelegations of, any authority conferred upon him or his agency by or pursuant to this Act to any officer, agent, or employee of such agency or, with the approval of the Surplus Propetry Administrator, to any other Government agency.

Sec. 20. Whenever any disposal agency shall begin negotiations for the disposition to

private interests of a plant or plants or other property, which cost the Government $1,000,000 or more, or of patents, processes, techniques or inventions, irrespective of cost, the disposal agency shall promptly notify the Attorney General of the proposed disposition and the probable terms or conditions thereof. Within a reasonable time, in no event to exceed ninety days after receiving such notification, the Attorney General shall advise the Surplus Administrator and the disposal agency whether, in his opinion, the proposed disposition will violate the antitrust laws. Upon the request of the Attorney General, the Surplus Property Administrator or other Government agency shall furnish or cause to be furnished such information as it may possess which the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section or to determine whether any other disposition of surplus property violates the antitrust laws. Nothing in this Act shall impair, amend, or modify the antitrust laws or limit and prevent their application to persons who buy or otherwise acquire property under the provisions of this Act. As used in this section, the term "antitrust laws" includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act; and the Act of August 27, 1894 (ch. 349, secs. 73, 74, 28 Stat. 570), as amended.

Pertinent Provisions of War Assets Administration Regulation 5 (12 F. R. 7423 and 7669):

§ 8305.1. *Definitions.*—(a) *Terms defined in the act.*—Terms not defined in paragraph (b) of this section which are defined in the Surplus Property Act of 1944 shall in this part have the meaning given to them in the act.

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(6) "Fair value" means the maximum price which a well-informed buyer, acting voluntarily and intelligently, would be warranted in paying if he were acquiring the property for long-time investment or for continued use with the intention of devoting such property to the best or most productive type of use to which the property is suitable or capable of being adapted.

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(11) "Industrial real property" means real property the highest and best use of which is for purposes of manufacturing, fabricating, or processing of products, for mining operations or for the construction, repair, or operation of ships and other water-borne carriers, and railroad trackage, pipelines, and pipe-line facilities used for transporting petroleum, petroleum products or gas, and power transmission lines. It includes land, or any interest in land, together with buildings, fixtures, facilities, utilities, and equipment located on such property or adapted to use in connection with such purposes, as well as unimproved land essential to the use of the property, and port terminals. It does not include, however, land, buildings, fixtures, facilities, utilities, or equipment classified by the Administration as airport property or nonindustrial property. In any case, the Administration may determine whether property is or is not industrial real property as defined herein.

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(16) "Plant" means an industrial installation capable of operation as an economic unit and includes structures, buildings, fixtures, facilities, utilities and equipment of all types located on or used in the operation of the installation. It may or may not include the land.

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§ 8305.3. *Basic policy.*—(a) In all actions taken pursuant to this part the disposal agency shall give due weight to the applicable objectives set forth in section 2 of the act. The Administrator finds that it is imperative that prompt action be taken with respect to the disposal of Government-owned real property except such property as may be needed for purposes of national defense. The disposal agency may, upon receipt of notice from the owning agency that property is to be declared surplus, take appropriate steps hereunder leading toward the disposal of real property prior to its declaration as surplus: *Provided, however,* That no final action shall be taken until an acceptable declaration has been filed.

(b) It is the policy of the Administrator that real property shall be disposed of by such methods as best meet the objectives of the act, including in appropriate cases the use of sealed bids.

(c) The disposal agency shall accept that proposal which it finds, upon an evaluation of all the information available to it, will most clearly tend to meet the applicable objectives and provisions of the act. In any case, the disposal agency shall reject any proposal if it finds that on the whole it conflicts with such objectives. In considering proposals the disposal agency shall give thorough consideration to whether such

objectives can best be met by leasing. Emphasis shall be placed upon the urgency of getting industrial property into civilian production or operation speedily so as to provide maximum employment in the postwar period. Due regard shall be given, however, to the possibility of enlarging the present major contribution to this objective which is made by small business and to the importance in this connection of maintenance of free independent competitive enterprise and the establishment of a maximum of independent operators in industry.

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§ 8305.5. *Classification.*—All surplus real property shall be classified by the Administration to determine the methods and conditions of, and the priorities applicable to, the disposition of the property. The classification may be revised from time to time.

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§ 8305.13. *Valuation and appraisal*—(a) *General.* Except as otherwise authorized by the Administration or as otherwise provided in this section, the disposal agency shall in all cases establish the fair value of the property assigned to it for disposition: *Provided, however,* That in those cases in which the property is classified as airport property and is to be disposed of to a State, local government or tax-supported institution, or is property which it is contemplated will be transferred to a Federal agency without reimbursement or transfer of funds, no estimate need be made of the value of the property.

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§ 8305.15. *Submission of proposals by nonpriority offerors.*—All proposals made by any nonpriority holder interested in the

acquisition of surplus real property available for disposal in accordance with the provisions of this part shall be in writing and, in addition to the financial terms upon which the proposal is predicated, shall set forth the willingness of the offeror to abide by the terms, conditions, reservations, and restrictions upon which the property is offered, and shall contain such other information as the disposal agency may request. Any information submitted, the disclosure of which might tend to subject the offeror to a competitive business disadvantage shall, upon request, be held in strict confidence by the disposal agency and by any other Government agency to which it is made available.

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§ 8305.18. *Price to priority claimants*—(a) *General.*—Except as hereinafter provided, the price to be charged priority purchasers shall be the fair value of the property offered for disposal.

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§ 8305.19. *Acceptance of offers*—(a) *General.*—The disposal agency shall allow a reasonable period of time within which the successful bidder shall consummate the transaction and shall notify the successful bidder of the period allowed. Offers from priority holders at their respective established considerations shall be accepted in the order of their priority. If there are several acceptable offers at the same price or consideration from offerors in the same priority group or from nonpriority offerors, the offer to be accepted from that group shall be selected as provided in paragraph (c) of this section. In evaluating offers, the disposal agency shall be guided by all of the applicable objectives of the act. In

addition, due consideration shall be given to the offers of nonprofit institutions and such offers shall be carefully considered, bearing in mind the nature of the nonprofit institution and the use to which it proposes to put the property. Disposal agencies may reject any offer which is below the fair value of the property other than an offer from a priority holder for the maximum consideration established for a transfer to such a priority holder. When a veteran, the spouse and children of a deceased serviceman, or an owner-operator has made an offer for more than one unit, only one of the offers of such offeror shall be accepted. No disposal shall be made at a price which is more than twenty-five (25) per centum below the established fair value until such disposal has been reviewed and approved by the Administration, unless that price or consideration is the maximum price or consideration which may be charged the purchaser.

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(c) *Equal offers.*—If equal acceptable offers are received for the same property from two or more offerors of the same priority group, or if equal offers are received from two or more nonpriority offerors, selection shall be made as follows:

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(2) * * * With respect to all other priority groups and nonpriority offerors, the selection shall be determined, unless otherwise directed by the Administration, by taking into consideration actual proposals received and the use of the property most desirable in the light of the applicable objectives of the act.

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(d) *Notice to unsuccessful bidders; nonperformance by successful bidder.*—When an offer for surplus real property has been accepted, the disposal agency shall notify the unsuccessful bidders of such acceptance and return their deposits, if any, to them. If the successful bidder fails to complete the transaction, the disposal agency shall promptly notify by mail all those who made unsuccessful offers during the priority period or any time allowed thereafter that if they renew their offers within fifteen (15) days from the date of mailing of the notice they will be reconsidered on the same basis on which they would have been considered had the offer accepted not been received in the first instance.

(e) *Absence of acceptable offers; methods of sale.*—If no acceptable offer is received, the disposal agency shall proceed to dispose of the property by negotiated sale, auction, or other suitable method. Such disposals shall be subject to the price restrictions of paragraph (a) of this section, unless otherwise authorized by the Administration.

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§ 8305.25. *Submission to Attorney General and approval by regulatory agencies.*—(a) *Attorney General.*—In any case in which real property available for disposal hereunder cost $1,000,000 or more, a complete statement of any proposed disposal to private interests which has been tentatively decided upon, including all information compiled or obtained by the disposal agency, shall be made available by the disposal agency to the Attorney General as required by section 20 of the act.

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§ 8305.28. *Exceptions.*—Exceptions to any portions of the procedure set forth in this part may be made by direction of the Administrator where such exception would not be in violation of the act.

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